9 FAM 40.21(a) Notes

9 FAM 40.21(a) N1 Applying INA 212(a)(2)(A)(i)(I)

9 FAM 40.21(a) N1.1 Determining Ineligibility

(TL:VISA-129; 11-9-95)

When adjudicating a visa application for an applicant whom the consular officer has reason to believe has committed a crime, the officer shall determine whether:

(1) *The offense was purely political [see 9 FAM 40.21(a) N9];*

(2) The offense committed involves moral turpitude [see 9 FAM 40.21(a) N2];

(3) The applicant has been convicted [see 9 FAM 40.21(a) N3]; and

(4) The applicant has admitted or may admit that he or she has committed acts which constitute the essential elements of a crime [see 9 FAM 40.21(a) N4].

9 FAM 40.21(a) N1.2 Exceptions to Ineligibility

(TL:VISA-129; 11-9-95)

Certain statutory exceptions may prevent a determination of ineligibility by reason of a conviction for a crime involving moral turpitude. These exceptions relate to:

(1) Crimes committed prior to age 18 [see 9 FAM 40.21(a) N7 and 9 FAM 40.21(a) N8] or

(2) Certain purely political offenses and convictions.

9 FAM 40.21(a) N2 Moral Turpitude

9 FAM 40.21(a) N2.1 Evaluating Moral Turpitude Based Upon Statutory Definition of Offense and U.S. Standards

(TL:VISA-129; 11-9-95)

To render an alien ineligible under INA 212(a)(2)(A)(i)(I), the *conviction must be for a statutory offense which involves moral turpitude. The presence of moral turpitude is determined by the nature of the offense for which the alien was convicted, and not by an independent analysis of the acts underlying the conviction. Therefore, evidence relating to the underlying act, including the testimony of the applicant, is not relevant to a*

determination of whether the conviction involved moral turpitude except when the statute is divisible [see 9 FAM 40.21(a) *N5.2] or a political offense [see 9 FAM 40.21(a) N9]. The presence of moral turpitude in a statutory offense is determined according to the moral standards prevailing in the United States.*

9 FAM 40.21(a) N2.2 Defining "Moral Turpitude"

(TL:VISA-29; 1-12-90)

The following definition of the term "moral turpitude" was cited with approval by the Attorney General in his opinion of October 13, 1933 (37 Op. A.G. 293) and by various Federal Courts, including the U.S. Supreme Court:

It is defined as anything done contrary to justice, honesty, principle, or good morals; an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. Moral turpitude implies something immoral in itself, regardless of the fact whether it is punishable by law. It must not merely be mala prohibita, but the act itself must be inherently immoral. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude.

9 FAM 40.21(a) N2.3 Common Crimes Involving Moral Turpitude

(TL:VISA-29; 1-12-90)

Categorized below are some of the more common crimes which are considered to involve moral turpitude. Each category is followed by a separate list of related crimes which are held not to involve moral turpitude.

9 FAM 40.21(a) N2.3-1 Crimes Committed Against Property

(TL:VISA-46; 8-26-91)

a. Most crimes committed against property which involve moral turpitude include the necessary element of fraud. The act of fraud involves moral turpitude whether it is aimed against individuals or government. Fraud generally involves:

(1) Making false representation;
(2) Knowledge of such false representation by the perpetrator;
(3) Reliance on the false representation by the person defrauded;
(4) An intent to defraud; and
(5) The actual act of committing fraud.

b. Other crimes committed against property involving moral turpitude involve an inherently evil intent, such as the act of arson. The following list comprises crimes frequently committed against property which may be held to involve moral turpitude for the purposes of visa issuance:

(1) Arson;
(2) Blackmail;
(3) Burglary;
(4) Embezzlement;
(5) Extortion;
(6) False pretenses;
(7) Forgery;
(8) Fraud;
(9) Larceny (grand or petty);
(10) Malicious destruction of property;
(11) Receiving stolen goods (with guilty knowledge);
(12) Robbery;
(13) Theft (when it involves the intention of permanent taking); and
(14) Transporting stolen property (with guilty knowledge).

c. Crimes against property which do not fall within the definition of moral turpitude include:

(1) Damaging private property (where evil intent not required);

(2) Breaking and entering (requiring no specific or implicit intent to commit a crime involving moral turpitude);

(3) Passing bad checks (where evil intent not required);

(4) Possessing stolen property (if guilty knowledge is not essentia

(5) Joy riding (where the intention to take permanently not required); and

(6) Juvenile delinquency.

9 FAM 40.21(a) N2.3-2 Crimes Committed Against Governmental Authority

(TL:VISA-46; 8-26-91)

a. Crimes committed against governmental authority which fall within the definition of moral turpitude include:

(1) Bribery;
(2) Counterfeiting;
(3) Fraud against revenue or other government functions;
(4) Mail fraud;
(5) Perjury;
(6) Harboring a fugitive from justice (with guilty knowledge); and
(7) Tax evasion (willful).

b. Crimes committed against governmental authority which would not constitute moral turpitude for visa-issuance purposes are in general, violation of laws which are regulatory in character and which do not involve the element of fraud or other evil intent do not involve moral turpitude. The following list assumes that the statutes involved do not require the showing of an intent to defraud or commit other evil:

(1) Blackmarket violations;
(2) Breach of the peace;
(3) Carrying a concealed weapon;
(4) Desertion from the Armed Forces;
(5) Disorderly conduct;
(6) Drunk or reckless driving;
(7) Drunkenness;
(8) Escape from prison;
(9) Failure to report for military induction;
(10) False statements (not amounting to perjury or involving fraud);
(11) Firearms violations;
(12) Gambling violations;
(13) Immigration violations;
(14) Liquor violations;
(15) Loan sharking;
(16) Lottery violations;
(17) Possessing burglar tools (without intent to commit burglary);
(18) Smuggling and customs violations (where intent to commit fraud is absent);
(19) Tax violations; and
(20) Vagrancy.

9 FAM 40.21(a) N2.3-3 Crimes Committed Against Person, Family Relationship, and Sexual Morality

(TL:VISA-129; 11-9-95)

a. Crimes committed against the person, family relationship, and sexual morality which constitute moral turpitude as it relates to visa issuance include:

(1) Abandonment of a minor child (if willful and resulting in the destitution of the child);

(2) Adultery [see INA 101(f)(2) repealed by Pub. L. 97-116];

(3) Assault (this crime is broken down into several categories which involve moral turpitude):

(a) Assault with intent to kill;

(b) Assault with intent to commit rape;

(c) Assault with intent to commit robbery;

(d) Assault with intent to commit serious bodily harm; and

(e) Assault with a dangerous or deadly weapon (Some weapons may be found to be lethal as a matter of law, while others may or may not be found factually to be such depending upon all the circumstances in the case. Such circumstances may include, but are not limited to, the size of the weapon, the manner of its use, and the nature and extent of injuries inflicted.);

(4) Bigamy;

(5) Contributing to the delinquency of a minor;

(6) Gross indecency;

(7) Incest (if the result of an improper sexual relationship);

(8) Kidnapping;

(9) Lewdness;

(10) Manslaughter:

(a) Voluntary, and

(b) Involuntary, *where the statute requires proof of recklessness, which is defined as the awareness and conscious disregard of a substantial and unjustified risk which constitutes a gross deviation from the standard that a reasonable person would observe in the situation. A conviction for the statutory offense of vehicular homicide or other involuntary manslaughter which only requires a showing of negligence will not involve moral turpitude even if it appears the defendant in fact acted recklessly.*

(11) Mayhem;

(12) Murder;

(13) Pandering;

(14) Prostitution;

(15) Rape (By statute, a person may be convicted of statutory rape even though the female consents and provided she is under the statutory age at the time of the commission of the act. “Statutory rape” is also deemed to involve moral turpitude.); and

(16) Sodomy.

b. Crimes committed against the person, family relationship, or sexual morality which do not involve moral turpitude include:

(1) Assault (simple) (i.e., any assault which does not require an evil intent or depraved motive, although it may involve the use of a weapon which is neither dangerous nor deadly);

(2) Bastardy (i.e., the offense of begetting a bastard child);

(3) Creating or maintaining a nuisance (where knowledge that premises were used for prostitution is not necessary);

(4) Fornication;
(5) Incest (when a result of a marital status prohibited by law);
(6) Involuntary manslaughter (when killing is not the result of recklessness);
(7) Libel;
(8) Mailing an obscene letter;
(9) Mann Act violations (where coercion is not present);
(10) Riot; and
(11) Suicide (attempted).

9 FAM 40.21(a) N2.4 Attempts, Aiding and Abetting, Accessories and Conspiracy

(TL:VISA-129; 11-9-95)

a. The following types of crimes are held to be crimes involving moral turpitude:

(1) An attempt to commit a crime deemed to involve moral turpitude;

(2) Aiding and abetting in the commission of a crime deemed to involve moral turpitude;

(3) Being an accessory (before or after the fact) in the commission of a crime deemed to involve moral turpitude; and

(4) Taking part in a conspiracy (or attempting to take part in a conspiracy) to commit a crime involving moral turpitude.

b. Conversely, where an alien has been convicted of, or admits having committed the essential elements of, a criminal attempt, or a criminal act of aiding and abetting, accessory before or after the fact, or conspiracy, and the underlying crime is not deemed to involve moral turpitude, then INA 212(a)(2)(A)(i)(I) would not come into play.

9 FAM 40.21(a) N3 Cases in Which Conviction Exists

9 FAM 40.21(a) N3.1 Defining Conviction

(TL:VISA-46; 8-26-91)

A finding of ineligibility under the first clause of INA 212(a)(2)(A)(i)(I) requires a conviction. Although the vast majority of judicial actions result in either a conviction or acquittal, there are isolated examples of action by a court which are neither. According to the Board of Immigration Appeals *(Matter of Ozkok*, Interim Decision #3044), a person shall be considered to be convicted if the court has adjudicated that person guilty or has entered a formal judgment of guilt. This is the only test which must be met **except** in cases where the adjudication of guilt has been withheld. In these cases, further examination of the specific procedure used and the state authority

under which the court acted is necessary. As a general rule, a conviction will be found for immigration purposes where all of the following elements are present:

(1) A judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt;

(2) The judge has ordered some form of punishment, penalty, or restraint (including but not limited to incarceration, probation, a fine or restitution, or community-based sanctions such as a rehabilitation program, a work-release program, revocation or suspension of a driver's license, deprivation or nonessential activities or privileges, or community service) to be imposed on the person's liberty; and

(3) A judgment or adjudication of guilt may be entered if the person violates the terms of the probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding the person's guilt or innocence of the original charge.

9 FAM 40.21(a) N3.2 Other Factors Bearing on Existence of Conviction

(TL:VISA-29; 1-12-90)

The question of the presence of a conviction is a factual matter, independent of official record. An indication that an alien has been convicted of a crime may appear in:

(1) Replies to questions;

(2) Reports of investigative and other government activities;

(3) Police records or other documents that the applicant may be required to submit or

(4) Any other kind of information which may be developed concerning the applicant.

9 FAM 40.21(a) N3.2-1 Evidence of Conviction

(TL:VISA-46; 8-26-91)

Official records generally suffice to establish the existence of a conviction. However, some convictions that would make INA 212(a)(2)(A)(i)(I) applicable are no longer a matter of record. It must be borne in mind that not all expungements or pardons serve to relieve the individual of the effects of the conviction for immigration purposes. Therefore, in cases where an expungement or pardon may have removed the record of conviction from official records, or where the accuracy of

records is otherwise suspect, the consular officer may require any evidence relevant to the alien's history which may appear necessary to determine the facts.

9 FAM 40.21(a) N3.2-2 Expunging Conviction Under U.S. Law

(TL:VISA-129; 11-9-95)

A full expungement of a conviction under U.S. law has been held to be equivalent in effect to a pardon granted under INA 241(b) (*Matter of E--V--, 5* I&N Dec. 194, and *(Matter of O--T--,* I&N Dec. 265). By extension, a pardon granted under INA 241(b) may also appear applicable with respect to INA 212(a)(2)(A)(i)(I). However, not all U.S. state expungement laws equate to **full** expungements, i.e., expunged for all purposes. *Where the conviction has been expunged, the consular officer shall request from the applicant a copy of the appropriate state statutory provisions relating to expungement. A state expungement may be considered equivalent to a full pardon even when the fact of the conviction may later be used as evidence in subsequent prosecutions or sentencing, or as a factor in the granting of drivers licenses or the licensing of teachers, physicians or lawyers. If the state provision contains more limitations than listed above, the consular officer shall request an advisory opinion as to the effectiveness of the procedure by submitting a full definition of the state expungement provisions to CA/VO/L/A.*

9 FAM 40.21(a) N3.2-3 Expunging Conviction Under U.S. Federal Law

(TL:VISA-46; 8-26-91)

The Comprehensive Crime Control Act of 1984, effective October 12, 1984, repealed the Federal First Offender provisions cited as 21 U.S.C. 844(b)(1) and the Federal Youth Corrections Act provisions cited as 18 U.S.C. 5021. Both of these procedures expunged convictions for all purposes. The consular officer shall honor certificates verifying expungement under either of these sections. These procedures have been replaced by 18 U.S.C. 3607. An expungement under this section likewise vitiates a conviction for purposes of INA 212(a)(2)(A)(i)(I).

9 FAM 40.21(a) N3.3 "Convictions" Relating to Pre-trial Actions

(TL:VISA-46; 8-26-91)

a. An applicant has not been convicted of a crime if he or she:

(1) Is under investigation;
(2) Has been arrested or detained;
(3) Has been charged with a crime; or
(4) Is under indictment.

b. However, such facts may indicate that some other basis of ineligibility may exist (e.g. second clause of INA 212(a)(2)(C), INA 212(a)(1), etc.). Consular officers, at their discretion, may hold in abeyance any case involving an alien charged, but not convicted of a crime to await the outcome of the proceedings, if the outcome is imminent, or to permit local authorities in appropriate cases to take steps to prevent the departure of the alien from their jurisdiction. Where applicable, in the case of a nonimmigrant visa applicant charged with a crime, the consular officer shall consider how the charge may affect the applicant's intention to return to his or her place of residence.

9 FAM 40.21(a) N3.4 "Convictions" Relating to Actions During Trial

9 FAM 40.21(a) N3.4-1 *"Nolo Contendere"* Plea

(TL:VISA-1; 8-30-87)

Court action following a plea of "*nolo contendere*" constitutes a conviction.

9 FAM 40.21(a) N3.4-2 Conviction in Absentia

(TL:VISA-29; 1-12-90)

A conviction *in absentia* does not constitute a conviction. However, any participation in judicial proceedings by the accused may imply that the conviction was not one made *in absentia*. For example, if a conviction in absentia has been appealed by the person convicted, the person has appeared for that purpose and the conviction has been affirmed, it is no longer considered a conviction *in absentia*. Similarly, representation by the accused in a trial proceedings may preclude a finding that the trial was conducted in absentia. Consular officers shall submit all cases where the facts suggest that a conviction may have been made in absentia to CA/VO/L/A for an advisory opinion.

9 FAM 40.21(a) N3.4-3 Conviction by Court-martial

(TL:VISA-29; 1-12-90)

A conviction by court-martial has the same force and effect as a conviction by a civil court (Memorandum of December 7, 1938, to the Department from the Judge Advocate General of the Army).

9 FAM 40.21(a) N3.4-4 Judicial Recommendation Against Deportation (JRAD)

(TL:VISA-46; 8-26-91)

a. Section 505 of the Immigration Act of 1990 Pub. L. 101-649 eliminated judicial recommendations against deportation (JRADs) for convictions which occurred on, or after November 29, 1990, the date of enactment of Pub. L. 101-649. JRADs granted prior to that date will be recognized by the INS and the Department of State. Those issued on or after that date will not be recognized.

b. Former INA 241(b)(2), repealed by Pub. L. 101-649, granted relief from deportation to an alien for whom the judge, at the time of sentencing or within thirty days thereafter, recommended to the Attorney General that the alien not be deported. Such judicial recommendation granted prior to November 29, 1990, has "the effect of immunizing the alien" from the application of INA 212(a)(2)(A)(i) with regard to the conviction for which the JRAD was issued. It has no effect, however, on ineligibility under INA 212(a)(2)(A)(ii) since 241(a)(2)(B) specifically exempted convictions for violations of drug laws from eligibility for a JRAD. JRADs affect convictions within the U.S. judicial system only. Convictions in foreign courts are not susceptible to a JRAD by either their own or by U.S. courts.

9 FAM 40.21(a) N3.4-5 Conviction While U.S. Citizen

(TL:VISA-129; 11-9-95)

a. In view of the elimination of the judicial recommendation against deportation, the finding of the Supreme Court in Costello v. INS, 376 U.S. 120, is now in question. The Supreme Court held that a conviction of a naturalized citizen did not invoke deportation under INA 241(a)(2)(A)(i) since the possibility of a judicial recommendation under INA 241(b) was not available for a citizen of the United States. Consequently, an alien who was convicted while a U.S. citizen was not ineligible to receive a visa under INA 212(a)(2)(A)(i) based solely upon such a conviction.

b. The consular officers shall submit all cases involving the conviction of an applicant while he or she was a citizen of the United States to VO/L/A for an advisory opinion. *[See § 9 FAM 40.21(a) PN1.]*

9 FAM 40.21(a) N3.5 Pardons Relating to Convictions

(TL:VISA-129; 11-9-95)

INA 241(b) provides that certain U.S. pardons remove deportability for U.S. convictions. *Matter of H--,* 6 I&N Dec. 90, holds that such pardons remove ineligibility under INA 212(a)(2)(A)(i)(I). Pardons which have this mitigating effect must be of specific kinds. Generally, they must be pardons

granted by the highest appropriate executive authority; a legislative pardon alone will not remove ineligibility. More specifically, the pardon must be granted by the President, State Governor, or other person specified in §40.21(a)(5). A pardon granted by a mayor is acceptable if such official has been designated by law as the supreme pardoning authority under relevant municipal ordinances. A pardon will remove ineligibility only when it is full and unconditional. The post shall submit any case presenting a pardon which bears limitations or restrictions to CA/VO/L/A for an advisory opinion. *[See §9 FAM 40.21(a) PN1.]* However, the provisions of INA 241(b) shall not apply in the case of an alien who has been convicted of an aggravated felony.

9 FAM 40.21(a) N3.6 Suspending Sentence, Probation, etc., Relating to Convictions

(TL:VISA-29; 1-12-90)

An alien who has been convicted and whose sentence has been suspended or reduced, mitigated, or commuted, or who has been convicted and has been granted probation or parole or has otherwise been relieved in whole or in part of the penalty imposed, is nevertheless considered to have been convicted.

9 FAM 40.21(a) N3.7 Appeals Pertaining to Convictions

(TL:VISA-129; 11-9-95)

A conviction does not exist when the ruling of a lower court has been overturned on appeal to a higher court. The consular officer shall, therefore, submit all cases involving convictions pending appeals at the time of visa application to CA/VO/L/A for an advisory opinion. *[See § 9 FAM 40.21(a) PN1.]*

9 FAM 40.21(a) N3.8 Vacating a Conviction

(TL:VISA-29; 1-12-90)

When a court acts within its jurisdiction and vacates its own original judgment of conviction, no conviction for the purposes of the immigration laws will exist. The vacating of a conviction on a writ of *coram nobis* eradicates the conviction for immigration purposes (*Matter of Sirhan*, 13 I&N Dec. 592).

9 FAM 40.21(a) N3.9 Absence of Conviction in Nolle Prosequi Cases

(TL:VISA-29; 1-12-90)

The grant of a new trial by a judge following a conviction, together with a dismissal of cause *nolle prosequi*, eradicates the conviction for immigration purposes.

9 FAM 40.21(a) N4 INA 212(h) Waiver

9 FAM 40.21(a) N4.1 Principal Alien

(TL:VISA-129; 11-9-95)

An immigrant alien who is ineligible under INA 212(a)(2)(A)(i)(I) is eligible to apply for a waiver of ineligibility under INA 212(h) [see also § 9 FAM 40.21(a) PN2] if it is established to the satisfaction of the Attorney General that:

(1) The activities for which the alien is excludable occurred more than 15 years before the date of the alien's application for visa;

(2) The alien's admission to the United States would not be contrary to the national welfare, safety, or security, and

(3) The alien has been rehabilitated.

9 FAM 40.21(a) N4.2 Certain Relatives of U.S. Citizens or LPRs

(TL:VISA-129; 11-9-95)

An alien immigrant who is the spouse, parent, son, or daughter of a U.S. citizen or an alien lawfully admitted for permanent residence in the United States may apply for a waiver under INA 212(h) [see also § 9 FAM 40.21(a) PN2] if:

(1) It is established to the Attorney General's satisfaction that the exclusion of such alien would result in extreme hardship to the U.S. citizen or lawfully resident spouse, parent, son, or daughter; and

(2) The Attorney General has consented to the alien's applying or reapplying for a visa to the United States.

9 FAM 40.21(a) N4.3 Evidence of Eligibility to Apply for a Waiver

(TL:VISA-129; 11-9-95)

When the court records or statutes leave doubt concerning an alien's eligibility for a waiver, the consular officer shall ensure that complete records and copies of all relevant portions of the statute under which the conviction was obtained are assembled, as well as any available commentary by authorities, prior judicial holdings and the like. The post shall forward these documents to INS together with the waiver application. [See §9 FAM 40.21(a) PN2 for waiver procedures.]

9 FAM 40.21(a) N5 Admitting Crimes Involving Moral Turpitude

9 FAM 40.21(a) N5.1 Alien Admission to Crime Involving Moral Turpitude

(TL:VISA-29; 1-12-90)

If it is necessary to question an alien for the purpose of determining whether the alien is ineligible to receive a visa as a person who has admitted the commission of the essential elements of a crime involving moral turpitude, the consular officer shall make the verbatim transcript of the proceedings under oath a part of the record. In eliciting admissions from visa applicants concerning the commission of criminal offenses, consular officers shall observe carefully the following rules of procedure:

(1) The consular officer shall give the applicant a full explanation of the purpose of the questioning. The applicant shall then be placed under oath and the proceedings shall be recorded verbatim.

(2) The crime, which the alien has admitted, must appear to constitute moral turpitude based on the statute and statements from the alien. It is not necessary for the alien to admit that the crime involves moral turpitude.

(3) Before the actual questioning, the consular officer shall give the applicant an adequate definition of the crime, including all essential elements. The consular officer must explain the definition to the applicant in terms he or she understands, making certain it conforms to the law of the jurisdiction where the offense is alleged to have been committed.

(4) The applicant must then admit all the factual elements which constituted the crime (*Matter of P--*, 1 I&N Dec. 33).

(5) The applicant's admission of the crime must be explicit, unequivocal and unqualified (*Howes v. Tozer,* 3 F2d 849)

9 FAM 40.21(a) N5.2 Admissions Relating to Acquittals or Dismissals

(TL:VISA-29; 1-12-90)

An admission by an alien is deemed ineffective with respect to a crime for which the alien has been tried and acquitted, or for which charges have been dismissed by a court.

9 FAM 40.21(a) N5.3 Admission With Record of Conviction

(TL:VISA-29; 1-12-90)

An admission augmenting the facts revealed by a conviction for a crime which does not appear to involve moral turpitude may be such that, on the basis of the facts revealed by the conviction and admission taken together, a finding of ineligibility may be appropriate.

9 FAM 40.21(a) N5.4 Failing to Prosecute Charges Concerning Offense

(TL:VISA-29; 1-12-90)

The failure of the authorities to prosecute an alien who has been arrested will not prevent a finding of ineligibility based upon an admission by the applicant.

9 FAM 40.21(a) N5.6 Guilty Plea Without Conviction

(TL:VISA-29; 1-12-90)

A plea of guilty in a trial will not constitute an admission if a conviction does not result or if it is followed by a new trial and subsequent acquittal or dismissal of charges.

9 FAM 40.21(a) N5.7 Official Confessions Constituting Admission

(TL:VISA-29; 1-12-90)

An official confession made in a prior hearing or to a police officer may constitute an admission if the statement meets the standards of these 9 FAM 40.21(a) Notes.

9 FAM 40.21(a) N5.8 Cases Involving Retraction of Admission

(TL:VISA-46; 8-26-91)

Once an admission has been made, attempts to retract it need not remove the basis of ineligibility. However, the consular officer must evaluate the truthfulness of such an admission. If the consular officer believes the admission to be true despite the alien's retraction, a finding of ineligibility is warranted. Conversely, if the consular officer believes the retraction to be justifiable, the alien's admission to a crime will have no effect on the case. [See 9 FAM 40.21(a) N4.11.]

9 FAM 40.21(a) N5.9 Coercing to Obtain Admission Prohibited

(TL:VISA-29; 1-12-90)

A consular officer shall not resort to threats or promises in an attempt to extract an admission from an alien. Action which tends to induce an alien to make an admission may constitute entrapment, and any admission or confession obtained by such methods may have no legal force or effect.

9 FAM 40.21(a) N5.10 Admitting All Essential Elements

(TL:VISA-29; 1-12-90)

a. In each case, the reviewing consular officer must keep in mind the essential elements of the offense. For example, the essential elements of the crime of perjury as defined in Section 1621 of Title 18 of the United States Code are:

(1) The taking of an oath;
(2) Duly administered by a competent authority;
(3) In a case in which an oath is required by law;
(4) A false statement;
(5) Knowingly or willfully made; and
(6) Regarding a material matter.

b. To constitute the admission of the commission of the crime of perjury (an offense involving moral turpitude) an alien must fully, completely, and unequivocally admit elements (1), (4), and (5). Elements (2), (3), and (6) are primarily questions of law which the alien is not required to admit but which must be found to exist to constitute the crime of perjury.

9 FAM 40.21(a) N5.11 Quality of Admission

(TL:VISA-46; 8-26-91)

In any case where an admission is considered independent of any other evidence, the consular officer shall develop that admission to a point where there is no reasonable doubt that the alien committed the crime in question. [See 9 FAM 40.21(a) N4.3 and 9 FAM 40.21(a) N4.4.]

9 FAM 40.21(a) N6 Determining Whether Conviction is Crime Involving Moral Turpitude

9 FAM 40.21(a) N6.1 Provisions of Law Defining Particular Offense

(TL:VISA-129; 11-9-95)

Where the record clearly shows the conviction to be predicated on a specific provision of law, whose terms necessarily embrace only acts that are offenses involving moral turpitude, the fact that the conviction was so predicated supports a conclusion that the conviction was of a crime that involves moral turpitude. *Since the ineligibility relates to the conviction of a crime, rather than a commission of a crime, involving moral turpitude, the statutory definition of the offense will determine whether the conviction involves moral turpitude.* Each separate provision of law defining an offense must be read in conjunction with such other provisions of law as are pertinent to its interpretation.

9 FAM 40.21(a) N6.2 Divisible Statutes Under U.S. and Foreign Law

(TL:VISA-29; 1-12-90)

If the provision of law on which a conviction is predicated embraces in its terms both acts that do and do not involve moral turpitude, the consular officer must evaluate the nature of the act. If the divisible statute in question is part of the law of one of the states, the consular officer may only examine the charge, plea, verdict, and sentence in assessing the presence of moral turpitude in the act for which the conviction was obtained. The consular officer cannot examine evidence provided in the trial or from any other source, or statements by the alien or any other person. If the statute in question is a part of the law of a foreign country, the consular officer may assess the presence of moral turpitude in the act for which conviction has been obtained by reference to any part of the record of the trial which produced the conviction. The consular officer shall consider also admissions of the alien in making such a determination.

9 FAM 40.21(a) N7 Sentencing Clause

(TL:VISA-46; 8-26-91)

The Immigration Act of 1990 amended the sentencing clause by removing the term “sentence actually imposed.” The emphasis of the exculpatory provisions, INA 212(a)(2)(A)(ii)(II), remains on the length of the term of imprisonment to which the alien was sentenced. Yet, the provision only applies to crimes for which the maximum penalty possible does not exceed imprisonment for one year.

9 FAM 40.21(a) N7.1 Provisions of INA 212(a)(2)(A)(ii)(I)

(TL:VISA-129; 11-9-95)

As amended, a conviction or admission of the commission of a crime of moral turpitude will not serve as the basis of ineligibility under INA 212(a)(2)(A)(i), if the following conditions have been met:

(1) The applicant has been convicted of or has admitted to the commission of only one crime;

(2) The maximum penalty possible for the crime of which the alien was convicted did not exceed imprisonment for one year;

(3) The applicant has been convicted, but the alien was not sentenced to a term of imprisonment in excess of six months regardless of the extent to which the sentence was ultimately executed;

(4) The applicant has admitted the commission of a crime of moral turpitude, and the maximum penalty possible for such crime does not exceed imprisonment for one year; and

(5) The applicant is otherwise admissible.

9 FAM 40.21(a) N7.2 Applying Sentencing Clause in Case of Conviction (Where Conviction is Present)

(TL:VISA-46; 8-26-91)

The amending language removed the phrase “sentence actually imposed” and replaced that with the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed). The contemplated “term of imprisonment” constitutes the specific sentence meted out by the court prior to the imposition of any suspension. For example, if a court imposes a sentence of nine months of imprisonment, but suspends all nine months and imposes two years of probation, the alien can not benefit from the sentencing clause because the nine months term of imprisonment exceeds the statutory 6 months maximum.

9 FAM 40.21(a) N7.3 Applicability of Law, Foreign or Domestic, Relevant to Crime

(TL:VISA-29; 1-12-90)

In assessing the applicability of this provision to an applicant who has admitted the commission of acts constituting a crime of moral turpitude, it is necessary only to look to the law, foreign or domestic, of the jurisdiction where the acts were committed. That is, the consular officer need only determine what punishment might have been imposed under the controlling statute had the applicant been convicted. It is not necessary, or any longer appropriate for purposes of the sentencing clause, to equate a foreign crime with one listed in the U.S. Code or D.C. Code, nor is it necessary, or appropriate, to refer to federal standards to distinguish between felonies and misdemeanors.

9 FAM 40.21(a) N7.4 Early Release, Parole

(TL:VISA-46; 8-26-91)

An applicant whose imposed sentence exceeds imprisonment for a period of six months cannot receive consideration under this provision of INA 212(a)(2)(A)(ii)(II) even though the applicant was released early on parole or for good behavior.

9 FAM 40.21(a) N7.5 Applying Sentencing Clause in INA 212(a)(2)(A)(ii)(II)

(TL:VISA-85; 10-1-93)

Since the sentencing clause is to be applied retrospectively as well as prospectively, aliens previously found to be ineligible under INA 212(a)(2)(A)(i)(II) might no longer be ineligible under the terms, as amended. All visa applications, therefore, must be assessed under the current statute without regard to any previous finding(s) of ineligibility.

9 FAM 40.21(a) N7.6 Distinguishing Between Single Offense and Single Conviction

(TL:VISA-46; 8-26-91)

The INA language requires that the sentencing clause exemption is applicable only if the alien has committed only one crime involving moral turpitude. The consular officer shall determine as a matter of fact whether, despite the fact that there is a single conviction, more than one crime may have been committed by the alien.

9 FAM 40.21(a) N7.6-1 Multiple Counts

(TL:VISA-29; 1-12-90)

While a general examination of the life of a visa applicant must not be undertaken, several factual patterns have been held to yield the conclusion that an alien convicted on two counts in one indictment is ineligible for the sentencing clause exemption even though only one conviction exists and the two offenses constituted a single scheme of criminal misconduct.

9 FAM 40.21(a) N7.6-2 Relevant Facts

(TL:VISA-29; 1-12-90)

In *Matter of S. R*., 7 I&N Dec. 495; *Matter of DeM.*, 9 I&N Dec. 218, it has been held that when an alien's conviction has been expunged under a state expungement preceding, the consular officer may use the conviction as evidence that the alien committed more than one crime of moral turpitude and is therefore ineligible for relief under the sentencing clause.

9 FAM 40.21(a) N8 Single Crime Involving Moral Turpitude While Under Age 18 (INA 212(a)(2)(A)(ii)(I)

(TL:VISA-46; 8-26-91)

a. The exception found in INA 212(a)(2)(A)(ii)(I) for an alien who has committed a single crime involving moral turpitude while under the age of 18 allows the issuance of a visa to the alien although the alien was convicted while over the age of 18 if the:

(1) Crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(2) Maximum penalty possible for the crime of which the alien was convicted (or for which the alien admits having committed constituted the

essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regard less of the extent to which the sentence was ultimately executed).

b. In some instances, court records in a case might show that an alien under the age of 18 years had committed more than one crime involving moral turpitude although only one conviction resulted. In such a case, the alien is ineligible for the exception.

9 FAM 40.21(a) N9 Juvenile Delinquency

9 FAM 40.21(a) N9.1 Definition

(TL:VISA-29; 1-12-90)

The FJDA defines a juvenile as a "person who has not attained his eighteenth birthday" and defines juvenile delinquency as "the violation of a law of the United States committed by a person prior to his or her eighteenth birthday which might have been considered a crime if committed by an adult."

9 FAM 40.21(a) N9.2 Using U.S. Standards

(TL:VISA-46; 8-26-91)

A foreign conviction based on conduct which constitutes an act of juvenile delinquency under U.S. standards, however treated by the foreign court, is not a conviction for a "crime" for the purpose of INA and, accordingly, may not serve as the basis for a finding of ineligibility under INA 212(a)(2)(A)(i)(I).

9 FAM 40.21(a) N9.3 Controlling Legislation

(TL:VISA-1; 8-30-87)

The standards embodied in the Federal Juvenile Delinquency Act (FJDA), as amended, govern whether an offense is considered a delinquency or a crime by U.S. standards. The FJDA, set forth in 18 USC 5031, was amended by the Juvenile Justice and Delinquency Act of 1974 (Pub. L. 93-415) and the Comprehensive Crime Control Act of 1984 (Pub. L. 98-473).

9 FAM 40.21(a) N9.4 Two Classes of Juvenile Delinquents

(TL:VISA-46; 8-26-91)

The Federal Juvenile Delinquency Act (FJDA) differentiates between two classes of juvenile delinquents. Therefore, each must be analyzed differently for the purposes of INA 212(a)(2)(A)(i)(I).

9 FAM 40.21(a) N9.4-1 Under Age 15

(TL:VISA-46; 8-26-91)

Juveniles who were under the age of 15 at the time of omission of acts constituting a delinquency are not to be considered as having been convicted of a crime. Therefore, no alien may be found ineligible under INA 212(a)(2)(A)(i)(I) by reason of any offense committed prior to the alien's 15th birthday.

9 FAM 40.21(a) N9.4-2 Between Ages 15 and 18

(TL:VISA-46; 8-26-91)

Juveniles between the ages of 15 and 18 at the time of commission of an offense will not be considered to have committed a crime, and thus be ineligible under INA 212(a)(2)(A)(i)(I), unless tried and convicted as an adult for a felony involving violence. A felony is defined in 18 USC 1(1) as an offense punishable by death or imprisonment for a term exceeding one year. A crime of violence is defined in 18 USC 16 as:

(1) An offense that has as an element the use, at tempted use, or threatened use of physical force against the person or property of another; or

(2) Any offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

9 FAM 40.21(a) N9.5 Juveniles Demonstrating Patterns of Criminal Behavior

(TL:VISA-46; 8-15-91)

Any case in which an alien's misconduct as a juvenile over a period of time has demonstrated a pattern of criminal behavior must be brought to the attention of the examining physician for a possible finding of ineligibility under INA 212(a)(1).

9 FAM 40.21(a) N10 Political Offenses

(TL:VISA-46; 8-26-91)

a. Where there is any indication that the offense for which the alien was convicted was of a political nature, or prosecution therefor was politically motivated, the consular officer shall request CA/VO/L/A to make a determination. The imposition of a cruel or unusual punishment, or of a punishment which is clearly disproportionate to the offense, as well as cases falling within the provisions of 22 CFR 40.21(a)(6), raise the question as to whether the conviction was for a purely political reason. In the following cases the aliens concerned were considered to have been convicted of "purely political offenses" within the meaning of INA 212(a)(2)(A)(i)(I) and (2)(B):

(1) An alien who was convicted by a South African court of robbery and assault because the alien helped overpower the guards and forcefully took possession of a government car in attempting to escape from a civilian internment camp.

(2) An alien convicted by a Netherlands court of having executed false ration coupons to benefit the underground during World War II.

(3) An alien who was a member of the German SS and was sentenced by a Soviet court to nine years for theft of some paper bags.

(4) An alien convicted by a Danish court of forging a receipt for a Danish passport and forging an official request for air transportation solely for the purpose of escaping from an Iron Curtain country.

(5) The Attorney General ruled in 1938 that a violation of Article 156 of the German Criminal Code regarding false statements under oath, which would normally be held to involve moral turpitude, did not involve moral turpitude because in effect the false statement was made by a Jew as part of resistance against the economic measures taken against the Jews in Germany (39 Op. A.G. 215).

b. The mere fact that an alien is or was a member of a racial, religious, or political minority shall not be considered as sufficient in itself to warrant a conclusion that the crime for which the alien was convicted was purely a political offense.

9 FAM 40.21(a) N11 Convicted War Criminals

(TL:VISA-85; 10-1-93)

See § 9 FAM 40.35(a) N3 for cases of persons convicted of war crimes.

9 FAM 40.21(a) N12 Aliens Under Supervision of Foreign Courts

(TL:VISA-1; 8-30-87)

In any case where an alien is subject to the supervision of a foreign court by reason of having been placed on probation or for other reasons arising out of criminal proceedings, action on such alien's visa application shall be suspended until such time as the supervision of the court has been terminated. The consular officer may, however, inquire informally of the appropriate court authority in a case such as that of a child or spouse of a U.S. citizen whether the probation or other supervision might be terminated if the applicant establishes eligibility to receive an immigrant visa.